No. 17-494

In The
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., and NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF PROFESSOR JOHN S. BAKER, JR. AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

Professor John S. Baker, Jr. is Professor of Law Emeritus at Louisiana State University Law School and a Visiting Professor at Georgetown University Law Center. He has taught Constitutional Law and litigated constitutional cases for many years. Professor Baker approaches his legal scholarship and litigation efforts with an Originalist understanding of the Constitution.

SUMMARY OF ARGUMENT

So far, the parties – in the Petition, the Response, and the Petitioner's Brief – have failed to address the impact of South Dakota's tax on transactions over the internet between buyers in the United States and foreign sellers. Simply to argue how the internet has altered the way commerce is conducted in the United States since the decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), is too parochial. The internet's World Wide Web has created an international marketplace.

The language of the South Dakota statute applies to all purchases over the internet. The tax scheme

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* or his counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for both parties have provided blanket consent for *amicus curiae* brief filings.

covers "any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota. . . ." S.B. 106, § 1, 2016 Legis. Assemb. 91st Sess. (S.D. 2016). Nothing in the statute's language would exclude internet purchases delivered into the state from another country. That South Dakota's tax would apply to foreign sellers means the tax should be analyzed under the Constitution's Commerce Clause and Import-Export Clause.

Your *Amicus* respectfully suggests that briefs addressing only the continued viability of the dormant-commerce-clause rationale in *Quill Corp.* are insufficient. This brief points to issues that your *Amicus* believes this Court would wish to consider.

The words of the Import-Export Clause provide that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." U.S. CONST. art. I, § 10, cl. 2. Unlike the extended analyses of the Due Process Clause and Dormant Commerce Clause in *Quill*, the wording of the Import-Export Clause – as applied to foreign commerce – would seem to involve only a determination as to whether a state tax is an impost or a duty on that commerce.

This Court's current reading of the Import-Export Clause came in *Michelin Tire Co. v. Wages*, 423 U.S. 276 (1976) (finding the *ad valorem* property taxes on imported goods permissible by reviewing the reasons prompting the inclusion of the Import-Export Clause

in the Constitution); *see also Dep't of Revenue v. Ass'n of Washington Stevedoring Companies*, 435 U.S. 734, 761 (1978) (holding the Washington business and occupation taxes to not be included in the Import-Export Clause prohibition because the application violated none of the constitutional policies identified in *Michelin*).

Michelin Tire adopted a threefold test as to whether a non-discriminatory state tax violates the Import-Export Clause. 423 U.S. at 285-86. The test looked to whether the tax (1) impedes the federal government's ability to "speak with one voice" in implementing the nation's foreign relations, (2) results in diverting import revenues from the federal government to the states, or (3) causes interstate rivalry and friction among states when a state receives import taxes on goods destined for other states. *Id.*

South Dakota's tax would seem to be an impost. That is, it is a tax on the privilege of foreign sellers shipping items or selling services directly into South Dakota and it applies only once the goods arrive in the state. The tax is linked to the time and place of importation. South Dakota's tax would need to be analyzed under the *Michelin* threefold test.

Along with considering the constitutionality of the tax itself, this Court should also consider its enforceability. The South Dakota statute asserts the right to sue out-of-state sellers. To do so, of course, the state would have to invoke its long-arm statute. To reach out-of-state websites with no presence or contacts with

the state, the state would be extending the reach of its jurisdiction beyond what this Court has approved as consistent with the Due Process Clause.

Before this Court issues a major ruling involving state taxes applicable to internet transactions, your *Amicus* respectfully urges the Court to have the benefit of full briefing on the Import-Export Clause, as well as on the foreign component of the Commerce Clause.

ARGUMENT

I. Internet Sales Often Involve Foreign Commerce and Many Fall Under the Import-Export Clause.

The sale of goods over the internet was virtually non-existent when this Court decided *Quill Corp. v. North Dakota*, 504 U.S. 298, in 1992. The general public first gained access to the internet in 1991 with the introduction of the World Wide Web. *See* National Science Foundation, *A Brief History of NSF and the Internet*.[2] It was the creation of the Web and later developments that made internet marketing possible. South Dakota has argued that the unprecedented disruption in the way goods are sold since this Court's decision in *Quill* has rendered its dormant-commerce-clause rationale completely outdated. South Dakota, however, has failed to follow through on its own argument by

[2] *Available at* https://www.nsf.gov/news/news_summ.jsp?cntn_id=103050 (last updated Aug. 13, 2003).

considering the foreign commerce dimension of internet sales.

Internet sales are erasing the line between domestic and foreign commerce. Like others, I have personally ordered a product on the internet from a foreign company, which delivered it directly to me. I could have, but did not, order that particular foreign product through Amazon. Other Americans have undoubtedly ordered from a foreign website while assuming, and without checking whether, it is based in the United States. Some websites with a U.S. address state in their Terms and Conditions that its products may be shipped to the purchaser directly from other countries.

These changes created by internet sales certainly challenge constitutional distinctions within the Commerce Clause and between the Commerce Clause and the Import-Export Clause. Under *Michelin Tire Co. v. Wages*, 423 U.S. 276 (1976), it is possible that the Import-Export Clause would block some, but not all, of the international sales covered by the South Dakota law. Your *Amicus* respectfully suggests that any reconsideration of *Quill* would not be well-informed without considering the Import-Export Clause and the foreign component of the Commerce Clause.

II. In *Quill*, the Court Did Not Need to Consider International Sales, but the South Dakota Law Requires Such Consideration.

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court did not need to consider international sales

for at least two reasons. First, internet sales had not yet been born. Moreover, *Quill*'s holding that a state could not tax an out-of-state seller with no location within the taxing state also necessarily protected sellers operating from other countries. If this Court were to overturn *Quill*'s dormant-commerce-clause holding, however, it would not follow that sellers operating from other countries could constitutionally be compelled to comply with the South Dakota law.

Neither South Dakota in its Petition for a Writ of Certiorari or in its brief on the merits, nor respondents in their Brief in Opposition to the Petition for a Writ of Certiorari have addressed international sales over the internet.[3] Yet, the South Dakota statute clearly applies to all goods and services purchased over the internet for delivery into the state:

> [A]ny seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state. . . .

S.B. 106, § 1, 2016 Legis. Assemb. 91st Sess. (S.D. 2016). Nothing in this language would exclude from

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[3] Given that an *amicus* brief supporting neither party is due within seven days of the filing of the Petitioner's Brief, your *Amicus* did not have the benefit of Respondents' Brief on the Merits.

the tax goods coming into the state from another country.

South Dakota seems to assume that the question to be decided is a simple and straightforward one of whether *Quill*'s dormant-commerce-clause holding should be overturned. *See* Petitioner's Brief for Writ of Certiorari ("Pet. Cert. Brief"). Petitioner may be giving too much significance to past statements by Justices Kennedy, Gorsuch, and Thomas. Neither Justice Kennedy nor then-Judge Gorsuch addressed international internet sales when they expressed their readiness to overturn *Quill* and its dormant-commerce-clause rationale. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134-35 (2015) (Kennedy, J., concurring); *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1147-51 (10th Cir. 2016) (Gorsuch, J., concurring). Petitioner is correct that Justice Thomas has advocated for ending the use of the "virtually unworkable" Dormant Commerce Clause, Pet. Cert. Brief at 24, but he has also expressed the view that the Import-Export Clause is the correct analysis. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 620 (1997) (Thomas, J., dissenting) (arguing that the terms "imports" and "exports" in the Import-Export Clause encompassed not only trade with foreign countries, but also trade with other States). Petitioner has failed to consider the international dimension of its tax.

That the South Dakota law would apply to foreign sellers with no presence in the United States necessarily means that the tax involves foreign commerce. The tax, therefore, requires analysis under the

Import-Export Clause. Deciding only whether *Quill*'s dormant-commerce-clause rationale should remain good law will not adequately address the constitutional questions involved.

III. Application of South Dakota's Tax to International Sales Over the Internet Requires Analysis Under the Import-Export Clause.

The words of the Import-Export Clause provide that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." U.S. CONST. art. I, § 10, cl. 2. Unlike the extended analyses of the Due Process Clause and Dormant Commerce Clause in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the wording of the Import-Export Clause – at least as applied to foreign commerce – would seem to involve only a determination as to whether a state tax is an impost or a duty on that commerce.

This Court's relatively few cases on the Import-Export Clause have undergone sharp changes in interpretation. In *Brown v. Maryland*, Chief Justice Marshall gave a dictionary or lexicographical interpretation of the Import-Export Clause's unqualified language and wrote that the Court believed "the principles laid down in this case, to apply equally to importations from a sister State." 25 U.S. (12 Wheat.) 419, 449 (1827) (invalidating state tax on importers of

goods produced abroad). Chief Justice Taney followed Marshall's reading that the clause applies as between states in *Almy v. California*, 65 U.S. (24 How.) 169 (1860) (finding a state tax on bills of lading unconstitutional). *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869), however, rejected Marshall's reading that the clause applied as between states, concluding that in "the ordinary use of these terms," impost and import only applied to items brought in from a foreign country.

This Court's current understanding of the Import-Export Clause came in *Michelin Tire Co. v. Wages*, 423 U.S. 276 (1976) (finding the *ad valorem* property taxes on imported goods permissible by reviewing the reasons prompting the inclusion of the Import-Export Clause in the Constitution); *see also Dep't of Revenue v. Ass'n of Washington Stevedoring Companies*, 435 U.S. 734, 761 (1978) (holding the Washington business and occupation taxes to not be included in the Import-Export Clause prohibition because the application violated none of the constitutional policies identified in *Michelin*).

While changing the analytical approach, the Court in *Michelin Tire* did so based on its understanding of the purpose of the Import-Export Clause:

> One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased.

> Before 1787 it was commonplace for seaboard States with port facilities to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States. At the same time, there was no secure source of revenue for the central government.

Michelin, 423 U.S. at 283.

Michelin Tire adopted a threefold test as to whether a non-discriminatory state tax violates the Import-Export Clause. 423 U.S. at 285-86. The test looked to whether the tax (1) impedes the federal government's ability to "speak with one voice" in implementing the nation's foreign relations, (2) results in diverting import revenues from the federal government to the states, or (3) causes interstate rivalry and friction among states when a state receives import taxes on goods destined for other states. *Id.*

Michelin Tire distinguished the non-discriminatory state property tax, at issue and upheld there, from "a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State." 423 U.S. at 301 (quoting *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847)). A tax on goods and services provided directly from abroad to a purchaser in South Dakota would seem to fall within *Michelin Tire*'s interpretation of the Import-Export Clause's prohibition on imposts and duties.

The Petitioner should be asked to explain how the South Dakota tax is not an impost. Imposts and duties

are taxes on the commercial privilege of bringing goods into a country. *Michelin Tire*, 423 U.S. at 287. Specifically, imposts are charges imposed at the time and place of importation. *Id.* at 291 (citing William W. Crosskey, *Politics and the Constitution in the History of the United States* 296-97 (1953)).

South Dakota's tax applies only to sellers who ship more than $100,000 worth of product into the state or make 200 or more shipments into the state. Pet. Cert. Brief at 6. The Petitioner may think that South Dakota has acted reasonably because the tax applies only once sellers meet certain requirements. However, Petitioner would have to explain how those minimums change the nature of the tax. *See Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) (finding that whether the tax is imposed at the time of sale or the time of importation is irrelevant because it is still a tax on the same privilege at either time). If the South Dakota tax is an unconstitutional impost under *Michelin*, then it must fail.

IV. South Dakota's Law Also Presents Enforcement Problems in Relation to Foreign Sellers with No Presence in the United States.

The South Dakota law provides for enforcement against those who do not comply voluntarily. The law allows for a state-court declaratory judgment process against any out-of-state seller believed to owe state taxes:

> Notwithstanding any other provision of law, and whether or not the state initiates an audit

> or other tax collection procedure, *the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law.* The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

S.B. 106, § 2, 2016 Legis. Assemb. 91st Sess. (S.D. 2016) (emphasis added).

But how will South Dakota assert personal jurisdiction over out-of-state and out-of-country websites with no presence in the state other than its electronic "presence"? South Dakota's long-arm statute asserts the broadest possible personal jurisdiction over out-of-state defendants, ending with a catch-all provision allowing plaintiffs to assert personal jurisdiction over "The commission of any act, the basis of which is not inconsistent with the Constitution of this state or with the Constitution of the United States." S.D. CODIFIED LAWS § 15-7-2.

Consideration of South Dakota's tax law should include the constitutional viability of the state's process for enforcing the tax. Given this Court's Due Process limits on long-arm statutes, South Dakota cannot assert specific personal jurisdiction over most out-of-state websites, much less those operating from abroad,

without going far beyond what this Court has recognized as consistent with Due Process. As this Court reinforced last term in *Bristol-Myers Squibb v. Superior Court of California*, specific jurisdiction requires the lawsuit to arise out of or directly relate to the defendant's contacts with the state. 137 S. Ct. 1773, 1780 (2017). Furthermore, the Court explained that:

> The primary concern in assessing personal jurisdiction is the burden on the defendant. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.

Id. (internal citations and quotations removed).

Enforcement of the South Dakota tax involves obvious practical problems and concerns for the coercive power of the state. Out-of-state and out-of-country websites do not target any particular state. Websites – at least those in English – hope to sell to a worldwide audience.

Websites are "present" only in the state(s) where they have employees, agents, or distribution centers. Otherwise, they are not present in any meaningful way. The vast majority are small operations, which are hoping to – and sometimes do – grow larger. If they do become a large operation, like Amazon, they find

advantages to becoming "present" in more states and, thereby, subject themselves to taxes in those states.

Unless this Court is prepared to expand its Due Process analysis to allow for state long-arm statutes to reach websites with no presence in or meaningful connection to the state, it would be confusing and counterproductive to have states asserting a right that, as a practical matter, is unenforceable against out-of-state web sellers.

Moreover, this Court should consider whether establishing a right (even if unenforceable) for South Dakota to assert personal jurisdiction over a website located outside the United States would be a dangerous precedent. Such a holding would be a precedent available to China and other countries to likewise assert personal jurisdiction over every U.S. website that sells products to citizens in their countries. Having any and every government in the world able to assert jurisdiction over virtually every website would be welcome to those countries seeking control over the internet.

If this Court were both to uphold the South Dakota law and to allow a further expansion of state long-arm jurisdiction, the tax could be enforced within the American judicial system against websites based in the United States. Nevertheless, enforcement against websites in other countries would be unachievable without a treaty. That reality, of course, reinforces the Framers' purpose of protecting, through the Import-Export Clause, the federal government's powers over

foreign commerce. *See also* U.S. CONST. art. I, § 8, cl. 3 (giving power to regulate commerce with foreign countries to the federal government).

CONCLUSION

For all of the foregoing reasons, the Court should require in this case, or in some future case, briefing on the Import-Export Clause as applied to foreign commerce.

Respectfully submitted,

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